BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of:	)	
	)	
Applications for Consent to the Transfer of Control of Licenses	)	
	)	
MediaOne Group, Inc.	)	
Transferor,	)	CS Docket No. 99-251
	)	
To	)	
	)	
AT&T Corp.	)	
Transferee.	)	

EX PARTE REPLY COMMENTS OF AT&T CORP. AND MEDIAONE GROUP, INC.

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I. INTRODUCTION AND SUMMARY

As AT&T has previously demonstrated, the video programming marketplace which the cable horizontal ownership rules are designed to protect is robust and competitive, and is becoming even more so.[1] By contrast, the local telephony marketplace remains staunchly resistant to the new competition that is the core goal of the 1996 Telecommunications Act. Thus, although not surprising, it is deeply ironic that SBC and

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[1] Indeed, only six parties filed comments in response to the *Ex Parte,* and none of these are programmers, the intended beneficiaries of the cable horizontal
(footnote continued ...)

U S West seek here to invoke the cable ownership rules, which are designed to protect video programming interests that these ILECs do not have, to block a merger that presents the best opportunity for real competition to their telephone monopolies. Indeed, SBC has further entrenched and enlarged its monopoly by voraciously acquiring other large local telephone companies -- a scheme it could not hope to have pursued if there were any counterpart to the cable horizontal ownership limit in the local telephone business. The Commission should reject these self-serving efforts to deny consumers the benefits of competition and expeditiously approve the proposed merger of AT&T and MediaOne.

AT&T's post-merger interest in TWE does not undercut this conclusion. AT&T and MediaOne have demonstrated that post-merger Time Warner will control the day-to-day management and operation of all TWE's businesses. AT&T and MediaOne also demonstrated that AT&T will have *no role* in the day-to-day management and operation of TWE's businesses, including the video programming businesses. No party filing comments in response to the *Ex Parte* disputed these facts.

Thus, because AT&T will not be "materially involved" in the video programming activities of TWE, its interest in TWE will be insulated. A few commenters disagree with this conclusion based on the fact that certain entities in which AT&T has an interest sell video programming to TWE. However, for several reasons, their analysis is unpersuasive

(...footnote continued)

ownership rules. *See* Section V.B., *infra*, for an analysis of why the merger will not adversely impact the video programming marketplace.

and cannot overcome the uncontested fact that there is no mechanism in the TWE partnership that gives AT&T *any* right or ability to influence the management and operation of TWE's video programming activities.

First, commenters are plainly wrong when they suggest that the cable attribution rules are so rigid and mechanical that if an entity in which AT&T has an interest sells programming to TWE that ends the debate and the Commission cannot even consider the totality of the circumstances surrounding the relationship between AT&T and that entity. Such an inflexible interpretation is at odds with the language of the *Cable Attribution Order*, in which the Commission expressly retained discretion to look at the unique facts of a particular situation, as well as years of Commission precedent.

This merger is a textbook example of why the Commission retained the discretion to look at all the facts in analyzing the relationship between two companies for purposes of the ownership rules. Here, AT&T's relationships with entities that sell video programming to TWE are so attenuated that it makes no sense to view the sale by these entities as a sale by AT&T, particularly given the fact that Time Warner alone controls TWE's activities as the purchaser of that programming.

Commenters who disagree misunderstand the nature of AT&T's relationship with the entities that sell programming to TWE. This is particularly true with regard to Liberty. Commenters view Liberty as a garden variety subsidiary of AT&T. It is not. Unlike a typical subsidiary, there are a large number of structural conditions which absolutely bar AT&T from having any role in the management or operations of Liberty or sharing in any of the economic value of Liberty. These conditions are described in detail below as well as in AT&T's prior filings. Moreover, commenters ignore the fact that most of Liberty's interests in video programming sold to TWE are in the form of passive, minority investments that do not give Liberty, much less AT&T, a role in the business activities of these independent programmers. Similarly, AT&T's interests in Rainbow, Viewer's Choice, and the programming companies in which MediaOne currently has an interest are sufficiently attenuated that it would be unreasonable to conclude that the vast competitive benefits of the merger should be lost for millions of Americans simply because these entities sell programming to TWE.

Second, while the facts fully justify a finding that AT&T's interest in TWE will be insulated, in the *Ex Parte* AT&T proposed additional safeguards, including a prohibition on communications with the programmers in which AT&T will have an interest, about the sale of programming to TWE. These safeguards make it even clearer that AT&T has no role in the sale of programming to TWE.

Finally, the substantial public interest benefits of the merger support the conclusion that the Commission should use its discretion to avoid a mechanical application of the rules that would threaten the merger. AT&T describes below the qualitative and quantitative nature of these benefits. No commenters even attempted to dispute that the merger would produce tremendous public interest benefits, including greatly increased local telephone competition and accelerated deployment of broadband facilities and services. Commenters' argument that the Commission should ignore these benefits as it analyzes the crucial question of whether AT&T's interest in TWE will be insulated are manifestly without merit.

In short, AT&T believes that its interest in TWE will be insulated because under no rational assessment of these facts can AT&T be said to be "materially involved" in the video programming activities of TWE. If, however, the Commission believes that the attribution rules are technically triggered because entities in which AT&T has an interest sell programming to TWE, AT&T asks the Commission to grant it a limited, 18-month waiver of the program sale prong of its limited partner insulation criteria. The Commission clearly has authority to grant such a waiver where special circumstances warrant deviation from the general rule and such deviation would better serve the public interest than strict adherence to the rule. The extraordinary public interest benefits that will be produced by the merger alone justify a waiver. However, there are additional special circumstances which further support a waiver, including the fact that AT&T will have no role in the day-to-day management of TWE, AT&T's interests in entities that sell programming to TWE are unusually attenuated, and AT&T proposes *additional* safeguards in connection with the waiver, described in detail herein, that would further remove it from the video programming activities of TWE.

II. AT&T'S POST-MERGER INTEREST IN TWE WILL BE INSULATED BECAUSE AT&T WILL HAVE NO MATERIAL INVOLVEMENT IN THE VIDEO PROGRAMMING-RELATED ACTIVITIES OF TWE.

Upon completion of the proposed merger, AT&T will assume the management and operation rights in TWE currently held by MediaOne. However, MediaOne's day-to-day management and operation rights *already have been terminated in their entirety.* Time Warner terminated those rights in August 1999 pursuant to the terms of the TWE partnership agreement after MediaOne notified Time Warner that it was terminating the non-compete clause in the agreement.[2] In fact, AT&T will have *no role* in the day-to-day management of TWE, including its video programming activities.[3] No party filing comments in response to the *Ex Parte* disputes these facts.[4]

Thus, because AT&T has demonstrated that it will not be materially involved in the video programming activities of TWE post-merger, its investment in TWE is insulated

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[2] *See Ex Parte* Comments of AT&T Corp. and MediaOne Group, Inc., filed in CS Docket No. 99-251, at 8-15 (Nov. 24, 1999) ("*Ex Parte*").

[3] The only right in TWE that AT&T will have post-merger is the limited right to veto action by TWE on certain extraordinary matters, known as "Participant Matters." A complete list of Participant Matters is contained in footnote 7 of the *Ex Parte*. As demonstrated in the *Ex Parte*, the Commission routinely permits insulated limited partners, LLC members, and other entities to participate in matters of this type as a means of protecting their investment without triggering attribution. No party filing comments in response to the *Ex Parte* contested AT&T's demonstration that the Participant Matter rights do not involve AT&T in the management of TWE or give it control or influence over TWE. Similarly, no party disputed that the Commission allows investors to retain such rights without triggering attribution. *See Ex Parte* at 19. AT&T and Time Warner may not agree completely about the scope of the remaining rights covered by the Participant Matters, but, under any view, the rights are squarely within the types of extraordinary investor protection rights that do not preclude insulation.

[4] U S West incorrectly claims that two of the Commission cases cited in AT&T's *Ex Parte* (*i.e.*, *Quincy Jones*, 11 FCC Rcd. 2481 (1995) and *BBC License Subsidiary L.P.*, 10 FCC Rcd. 7926 (1995)) have been superseded by the Commission's recent broadcast attribution order. *See* U S West at n. 17. First, AT&T relied on these cases primarily to support the proposition that its veto rights over Participant Matters do not disturb its insulation in TWE, and nothing in the cable or broadcast attribution orders contradicts that position. Second, the broadcast order does not, as a factual matter, overrule either case. The Commission said it intends to resolve cases conditioned on the outcome of the attribution proceeding, such as *BBC License Subsidiary* and *Quincy*, in separate orders. *See In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Rept. & Order, MM Docket No. 94-150, FCC 99-207, at ¶ 65 and n. 298 (1999) ("*Broadcast Attribution Order*").

and not attributable under the cable attribution rules.[5] The only disagreement that any commenters raise with this conclusion is that certain entities in which AT&T has an interest sell programming to TWE. As AT&T demonstrates in the next section, its interests in these entities are so attenuated that they cannot reasonably be said to "materially involve" AT&T in TWE's video programming activities, particularly in light of the foregoing facts.

III. CONTRARY TO THE CLAIMS OF A FEW COMMENTERS, AT&T'S INSULATION IN TWE IS NOT DISTURBED BY THE FACT THAT CERTAIN ENTITIES IN WHICH AT&T HAS A LIMITED INTEREST SELL PROGRAMMING TO TWE.

A few commenters assert that AT&T's interest in TWE cannot be insulated because AT&T also has an interest in certain entities that sell video programming to

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[5] AT&T submitted with its *Ex Parte* the declaration of Professor John C. Coffee, a recognized expert in the field of corporate governance, which supports this conclusion. Professor Coffee points out that under any rational analysis of corporate governance rights, AT&T cannot be said to be materially involved in the video programming activities of TWE post-merger. *See* Declaration of Professor John C. Coffee, Jr., submitted as Appendix E to AT&T/MediaOne Reply Comments, filed in CS Docket No. 99-251 on September 17, 1999, at ¶ 27 ("*Coffee TWE Declaration*"). CU *et al.'s* attacks on AT&T and Professor Coffee for allegedly focusing improperly on a "control" standard in their analyses of AT&T's role in TWE completely mischaracterize AT&T's and Dr. Coffee's statements. AT&T's analysis and conclusion made clear that post-merger "AT&T will inherit MediaOne's limited rights and have *no role* in the day-to-day management of TWE" and that "AT&T will have *no role* in the video programming activities of TWE." *Ex Parte* at 13 (emphasis in original); *see also id.* at 13-15 (discussing extensively the reasons why AT&T will not be materially involved in the video programming decisions of TWE). Similarly, Professor Coffee's conclusion was that MediaOne has "no involvement in day-to-day management of TWE's cable operations." *See Coffee TWE Declaration* at ¶ 27 (cited in *Ex Parte* at 13). Since AT&T will have *no role* in TWE's day-to-day video programming activities post-merger, by definition it will not be able to *influence* these activities, let alone control them.

TWE.[6] There are three critical flaws in these commenters' position. First, they contend that the attribution rules are entirely mechanical and that the Commission has absolutely no flexibility to look at the unique circumstances of a particular relationship. Second, they mischaracterize the nature of the relationships between AT&T and the entities that sell video programming to TWE and, therefore, mistakenly conclude that AT&T is involved in the video programming activities of TWE. Third, they assert that the Commission cannot take into account the benefits of the proposed merger in considering whether AT&T's relationship with TWE will be insulated. AT&T addresses each of these flaws below.

A. The Commission Has Flexibility To Look At The Totality Of The Circumstances And Conclude That In A Particular Situation Attribution Is Not Appropriate.

CU *et al.*, U S West, and SBC contend that the cable attribution rules must be applied so rigidly that the Commission is forbidden from considering even compelling facts demonstrating that attribution in a particular context is inappropriate.[7] Such a position is at odds with the plain language of the *Cable Attribution Order*, as well as years of Commission precedent.[8]

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[6] *See* SBC at 8-11; U S West at 7-10; CU *et al.* at 15-22.

[7] *See* CU *et al.* at 27-29; U S West at 11; SBC at 11.

[8] The Commission has historically looked beyond the technical circumstances of a situation where the facts warrant. For example, in *BBC License Subsidiary L.P.*, the Commission noted that it has "in adjudicatory proceedings expressly embraced the conclusion that [it] must assess the cumulative effect of all relevant factors to determine whether the goals of [the] multiple ownership rules will be 'served or hindered by the structure and relationship presented to [it].'" *BBC License Subsidiary L.P.*, at ¶ 42. Likewise, in *KKR Associates, L.P.*, the Commission concluded that based on "the circumstances of [the] case . . . [it] should look at the cumulative effect of all
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Even if the Commission wishes to pursue a "bright line" approach to attribution, it does not follow that it is powerless to recognize that occasionally there are unique circumstances in which it makes no sense to attribute one company to another. In fact, in the *Cable Attribution Order*, the Commission specifically reserved the right to evaluate on a case-by-case basis relationships that involve unique factual circumstances: "*We retain discretion to review cases that present unique issues where the public interest requires such a review.*"[9] Thus, even if the Commission were to find as a technical matter that AT&T was not fully insulated with regard to TWE because entities in which AT&T has an interest sell programming to TWE, it has the discretion to look at the totality of the circumstances and recognize that it is inappropriate to adhere to such a technical application of the rules.

It is particularly important that the Commission exercise such discretion where adherence to a strict "bright line" test would frustrate other important public policy goals.

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relevant factors" to determine if the purpose of the ownership rules would be served. *KKR Associates, L.P.*, 2 FCC Rcd. 7104, at ¶ 18 (1987). *See also Quincy Jones*, at ¶ 30 (assessing the cumulative effects of partner's interests and relationships with limited liability company); *Univision Holdings, Inc.*, 7 FCC Rcd. 6672, at ¶ 26 (1992) (concluding that participation of foreign investors, when considered in totality, did not implicate alien ownership rules).

9 *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission's Cable Attribution Rules*, Rept. & Order, CS Docket Nos. 98-82, 96-85, FCC 99-288, at ¶ 92 (1999) ("*Cable Attribution Order*") (emphasis added). Similarly, with regard to the broadcast attribution rules, the Commission "retains discretion to review individual cases that present unusual issues on a case-by-case basis where it would serve the public interest to conduct such a review." *Broadcast Attribution Order*, at ¶ 44.

For example, in *Quincy Jones*, the Commission looked beyond technical application of the attribution rules in order to further its minority ownership policy:

> [I]n lieu of strictly applying the limited partnership rules . . . we shall for purposes of the minority exception examine LLC agreements and other pertinent documents to determine whether the level of "influence" of the members seeking the exception is consistent with such treatment. That is, we shall determine whether the influence of LLC members seeking nonattributable status, even though not fully insulated, has been *sufficiently attenuated* such that our interest in facilitating minority ownership outweighs our concern with such influence.[10]

AT&T's relationship to TWE presents an analogous situation. Just as in *Quincy*, it makes no sense to adhere to a purely technical application of the attribution rules because the totality of the circumstances makes clear that AT&T has no material involvement in the video programming activities of TWE.[11] Further, this conclusion is strongly supported

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[10] *Quincy Jones*, at ¶ 22 (emphasis added). *See also Fox Television Stations, Inc.*, 11 FCC Rcd. 5714 (1995) (permitting Fox to retain a level of alien ownership that exceeded the statutory threshold because of public interest determination based on unique factors, principally the fact that a forced restructuring would result in a capital gains tax for Fox ranging from $540 million to $720 million); To-Quyen Truong, Associate Chief, Cable Services Bureau, comment during press conference following Open Meeting on cable attribution rule (Oct. 8, 1999) ("In the merger context, we always look at the entirety of the public interest concerns, which means that regardless of whether there is a violation of a rule that is being currently enforced, we will still make an assessment of the potential harms as well as the potential benefits from the merger and the growth in size."); Deborah Lathen, Chief, Cable Services Bureau, comment during press conference following Open Meeting on cable attribution rule (Oct. 8, 1999) ("Each merger is different and it is independent. We look at each merger in that light as a separate merger, and we look at the facts particular to that case.").

[11] The conclusion that the Commission should avoid overly strict application of the attribution rules is particularly warranted because the cable horizontal rules have been stayed. In fact, at the time the proposed merger was announced, neither the cable horizontal rules nor any Commission interpretation of the program sale prong of the limited partnership insulation criteria had been adopted. Thus, it is especially appropriate

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by the fact that AT&T's merger with MediaOne presents the best opportunity to achieve the long-sought goal of broad local telephone competition.[12]

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that the Commission avoid an interpretation of the rules that would have an extreme and unreasonable impact on the proposed merger. Moreover, it is difficult to see how the underlying purposes of the cable horizontal ownership rule -- namely to limit an MSO's ability to exercise monopsony power, engage in vertical foreclosure, or otherwise reduce program diversity -- could reasonably be said to be impaired by the mere fact that a few program services in which AT&T has highly attenuated interests sell programming to TWE.

[12] In actuality, under a purely technical application of the rules' plain language, AT&T's case for insulation would be equally strong. As the insulated limited partner exception makes clear, it is the limited partner *itself* that must not be involved in the video programming-related activities in order to avoid attribution. 47 C.F.R. § 76.503 Note 2(b)(1) ("[A] limited partnership interest shall be attributed to a limited partner unless *that partner* is not materially involved, directly or indirectly, in the management or operation of the video programming-related activities of the partnership.") (emphasis added). Similarly, the seven "insulation criteria" with which the limited partner must comply -- including criterion #6 which covers program sale -- also speak solely in terms of the limited partner *itself* as opposed to its *affiliates*. *See Cable Attribution Order*, at ¶ 64. Thus, because the plain language of the rule and the insulation criteria only preclude the limited partner *itself* from performing any material video programming-related services for the limited partnership, the sale of programming to TWE by programmers in which AT&T has at most an attenuated interest cannot and should not destroy AT&T's status as an insulated limited partner in TWE. This interpretation is especially compelling given that other Commission ownership rules expressly reference an entity's "affiliates." *See, e.g.*, 47 C.F.R. § 76.501(e)(1) ("A cable operator may directly or indirectly, *through an affiliate* owned, operated, controlled by, or under common control with the cable operator, offer SMATV service within its franchise area ....") (emphasis added). *See also* 47 C.F.R. § 21.912(b); 47 C.F.R. § 74.931(h). The fact that the limited partner insulation rule and criteria do not expressly refer to affiliates even though these other rules *do* strongly suggests that the limited partner *itself* is the sole focus of the insulation analysis.

B. The Totality Of The Circumstances Makes Clear That AT&T Will Have No Material Involvement In The Video Programming Activities Of TWE.

1. Time Warner Will Have Complete Control Over The Day-to-Day Management And Operation Of TWE Post-Merger.

As AT&T has shown, Time Warner has *de jure* and *de facto* control of TWE, and AT&T will have no rights to involve itself in the day-to-day management or operation of TWE's video programming activities. CU *et al.*, U S West, and SBC ignore this uncontested reality, notwithstanding that it is the most important factor in determining whether AT&T will be materially involved in TWE's video programming activities post-merger, and fail to show how programming sale by any of the entities attributed to AT&T can overcome this uncontroverted fact.[13]

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[13] U S West insists that AT&T seek prior Commission approval with respect to any "material modification" to the TWE Limited Partnership Agreement ("LPA"). U S West at 13. AT&T has already acknowledged in its *Ex Parte* that any changes to the LPA would have to "be consistent with [the Commission's] rules," and reiterates here that it fully intends to comply with those requirements. *See Ex Parte* at 5. U S West makes a similar request for prior Commission approval for any directors appointed by AT&T to the TWE Board. U S West at 13. AT&T has already stated in its *Ex Parte* that "it will be obligated to provide the Commission the names of its proposed representatives to the TWE Board, and to demonstrate that such representatives are properly recused from all the video programming activities of AT&T and TWE." *See Ex Parte* at 24. AT&T fully intends to honor that commitment.

2. AT&T's Relationships With Companies That Sell Programming To TWE Are Sufficiently Attenuated So That Such Interests Do Not Change The Fundamental Fact That AT&T Has No Material Involvement In The Video Programming Activities Of TWE.

Post-merger, AT&T will have interests in the following entities that sell video programming to TWE -- Liberty, Rainbow, Viewer's Choice, and the companies in which MediaOne currently has an interest. CU *et al.*, U S West, and SBC assert that these interests make it impossible for AT&T to insulate its interest in TWE.[14] They base this conclusion on the assumption that AT&T plays a meaningful role in the management and operation of these entities. This leads them to the belief that any sale of programming to TWE by these entities should be considered the same as the sale of programming to TWE by AT&T and, therefore, that AT&T is "materially involved" in the programming activities of TWE. This analysis, and the assumptions that underlie it, are wrong.

In fact, AT&T's interests in entities that sell programming to TWE are so attenuated that one cannot reasonably conclude that the sale of programming by those entities to TWE "materially involves" AT&T in the video programming activities of TWE. AT&T demonstrates the attenuated nature of these relationships below.[15]

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14 *See* CU *et al* at 15-22; U S West at 7-10; SBC at 8-11.

15 *See also Ex Parte* at 15-23. U S West, SBC, and CU *et al.* assert that AT&T improperly focused on control, rather than influence, when discussing the entities in which AT&T has an interest that sell programming to TWE. *See* U S West at 9; SBC at 10-11; CU *et al.* at 26-27. These comments mischaracterize AT&T's statements. As AT&T made clear in its *Ex Parte*, AT&T has minority, non-managing, and, in most cases, indirect interests in entities that sell programming to TWE, and, because those interests are attenuated, AT&T has no ability to control *or influence* the video programming activities of TWE. *See Ex Parte* at 3. Moreover, in order to allay any possible concerns

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With regard to AT&T's interest in Liberty, it is useful to provide some historical background. When AT&T acquired TCI, there were two types of TCI tracking stock -- cable system tracking stock and Liberty tracking stock.[16] AT&T paid the shareholders of TCI's cable system tracking stock with AT&T shares. However, with regard to TCI's Liberty tracking stock, AT&T created a new AT&T Liberty tracking stock which it exchanged, on a one-to-one basis, for the TCI Liberty tracking stock. Thus, while AT&T technically "owned" Liberty after its acquisition of TCI, AT&T did not pay any premium or issue any common shares for the assets of Liberty.

Consequently, in negotiating the merger, TCI imposed extraordinary restrictions to ensure that AT&T could not share in the economics of Liberty, and to ensure the

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about AT&T's influence over such activities, AT&T proposed in its *Ex Parte* to certify that it will have *no communications or other participation or involvement with the programming entities regarding the sale of their programming to TWE. See Ex Parte* at 22. U S West suggests that AT&T's commitment not to communicate with Liberty is meaningless because "Liberty is AT&T." U S West at n. 14. However, this assertion is belied by the facts presented by AT&T previously and below which demonstrate that AT&T and Liberty are operationally and economically distinct entities such that AT&T's commitment not to communicate with Liberty regarding the sale of its programming to TWE should allay any possible concerns the Commission may have.

[16] Previously, TCI also had TCI Ventures tracking stock, but these shares were merged with the TCI Liberty tracking stock concurrently with AT&T's acquisition of TCI.

operational autonomy of Liberty. As a result of these restrictions, Liberty is, in effect, a structurally separate company from AT&T.[17]

The restrictions placed on AT&T's relationship with Liberty include the following:

1) Liberty has a separate Board of Directors which has been structured to ensure that the separate directors and separate management of Liberty will fully control Liberty's operations. The Liberty Board has Class A, Class B, and Class C directors. The Class A directors have one year terms. The Class B directors have seven year terms. The Class C directors have 10 year terms. Each Class has three directors. The Class B and Class C directors were installed by TCI prior to the AT&T merger, and consist of current or former officers or directors of Liberty and TCI prior to the merger. AT&T designated the Class A directors only. The ratio of directors in each class must always stay the same, so that any increase in Class A directors must be accompanied by a like increase in Class B and C directors. If any director in a particular Class cannot serve his or her full term, the other directors in that Class appoint a replacement director. AT&T has no right to remove any of the Class B or C directors without cause. Thus, the Liberty Board is and will be controlled by the persons installed by TCI;

2) Because the Liberty tracking stock is issued by AT&T, issuance of new shares of Liberty tracking stock, splits of the Liberty tracking stock, and the like must be approved by the AT&T Board. Similarly, it is more efficient to effect any repurchases of Liberty tracking stock through AT&T as the issuer. The AT&T Board has, however, delegated decisions on these matters to its Capital Stock Committee, which is comprised of Dr. John Malone and two independent directors;

3) Similarly, as a matter of law, the right to declare dividends on the tracking stock is reserved to the parent corporation as the issuer of that stock. However, the AT&T Board has adopted a policy that, subject to any corporate law restriction, it will pass through any dividend paid by Liberty to the holders of Liberty tracking stock.

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[17] The restrictions are contained in a variety of places, including the AT&T Charter, the AT&T By-laws, a separate Policy Statement adopted by AT&T, and certain inter-company agreements entered into between AT&T and Liberty.

4) In addition, AT&T is specifically prohibited from taking any of the following actions without a special class vote of the AT&T Liberty tracking shareholders:

- Changing without Liberty's consent any of the contractual protections for Liberty contained in contracts between AT&T and Liberty;
- Altering the number of authorized shares of AT&T Liberty tracking stock;
- Changing the voting rights or other rights of the shareholders of the AT&T Liberty tracking shares;
- Disposing of Liberty; and
- Merging Liberty with another entity;

5) Liberty does not have any non-compete restrictions, and it is free to challenge AT&T in any business;

6) Liberty has no restriction on the suppliers it may use, so it is free, for example, to choose any provider of long distance telephone service;

7) Other protections include the following:

- Neither AT&T nor Liberty can force financial responsibilities on the other;
- Neither AT&T nor Liberty has recourse to the assets of the other to pay for or guarantee debt (so long as AT&T is not bankrupt); and
- There is no allocation of overhead or corporate expenses between AT&T and Liberty, and the companies have separate accountants;

8) AT&T and Liberty have completely separate responsibilities for employees; and

9) If the incumbent Class B and Class C directors, or successors selected by them, cease to control the Liberty Board, Liberty's assets would be contributed to a new Limited Liability Corporation ("LLC"). This LLC would have no Board of Directors and would be controlled by John Malone and others selected by him. Under this circumstance, AT&T's interest in Liberty would be even further attenuated.

As a practical matter, AT&T has no role in the management or operation of Liberty. Even if Liberty is technically attributable to AT&T, the restrictions that have been built into the relationship are so significant and pervasive that it cannot rationally be seen as materially involving AT&T in the video programming activities of TWE simply because Liberty sells programming to TWE.[18]

Similarly, AT&T has only an indirect, minority interest in Rainbow (via AT&T's minority interest in Cablevision).[19] As AT&T has demonstrated, the Dolan family and certain trusts in favor of members of the Dolan family, through their supervoting Class B shares, control the Cablevision Board and, in turn, control the Rainbow programming

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[18] Moreover, as AT&T pointed out in the *Ex Parte*, Liberty sells very few programming services *directly*. *See Ex Parte* at 18. Although Liberty has a financial interest in a number of programming services, the vast majority of them are controlled and managed by other entities. Thus, AT&T's interest in these services is even further attenuated. U S West contests AT&T's statement that Liberty sells very few programming services directly. U S West at 7. In fact, however, the very SEC filing referenced by U S West demonstrates that Liberty has minority interests in the overwhelming majority of its programming assets. *See* Liberty Media Corp., Securities and Exchange Commission Form S-4A, Amendment No. 2, at 43-75 (filed Nov. 4, 1999) ("*Liberty SEC Report*"). Furthermore, as a factual matter, Liberty sold its 50 percent interest in Fox Sports. *See* Bob Diddlebock and John M. Higgins, *Liberty's Bells and Whistles*, Broadcasting & Cable, June 14, 1999, at 61. Moreover, while U S West selectively quotes certain aspects of Liberty's SEC filings, it conveniently ignores the more relevant ones in that very same document which support AT&T's description of Liberty's ownership structure. *See Liberty SEC Report* at 1 ("We have a substantial degree of managerial autonomy from AT&T as a result of our corporate governance arrangement with AT&T. Our board of directors is controlled by persons designated by TCI prior to its acquisition by AT&T, and our board will continue to be controlled by those persons, or others chosen by them, until at least 2006. Our management consists of individuals who managed the businesses of Liberty prior to the AT&T merger.").

[19] *See Ex Parte* at 16.

services.[20] Thus, even though Rainbow may be technically attributable to AT&T, AT&T's interest in Rainbow, and its ability to direct or influence the operation or management of Rainbow, is substantially attenuated.

AT&T also will inherit MediaOne's passive, minority interest in a handful of programming entities, and 50 percent interest in New England News and Fox Sports New England. However, MediaOne has no involvement in the management of those entities.[21] Again, even though these entities will be technically attributable to AT&T, because AT&T will have no involvement in the management or operation of these entities, AT&T's interests will be substantially attenuated.

Finally, AT&T does not today, and will not post-merger, manage Viewer's Choice.[22] Accordingly, programming sales by Viewer's Choice to TWE also should not affect AT&T's insulation in TWE.

Under these circumstances, where AT&T's interest in entities that sell programming to TWE are substantially attenuated, the Commission should not adhere to a technical application of its rules that would sacrifice the vast competitive telephony and other benefits of the merger for millions of Americans simply because these entities sell programming to TWE. Given all the unique circumstances of AT&T's relationship with

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[20] *See id.; AT&T/MediaOne Public Interest Statement*, filed on July 7, 1999, in CS Docket No. 99-251, at 12 ("*Public Interest Statement*"); *AT&T/MediaOne Reply Comments,* filed on Sept. 17, 1999, in CS Docket No. 99-251. at 36 ("*Reply*").

[21] *See Ex Parte* at 16; *Public Interest Statement* at 17; *Reply* at 37.

[22] *See Ex Parte* at 17.

TWE post-merger, particularly Time Warner's *de jure* and *de facto* control of TWE, it is not reasonable to conclude that such sales "materially involve" AT&T in the programming activities of TWE.

AT&T believes that these facts fully justify a finding that AT&T's interest in TWE post-merger will be insulated and therefore not attributable. However, in the interest of expediting Commission review and approval of the merger so that AT&T can begin to deploy competitive local telephony, high-speed Internet access, and other broadband offerings to millions of American consumers, AT&T proposed in the *Ex Parte* additional safeguards that the Commission could adopt with respect to the programming interests discussed above. Specifically, AT&T committed to certify that it will have no communications or other participation or involvement with Rainbow, Viewer's Choice, Liberty, or the programming entities in which MediaOne currently has an interest regarding the sale of programming by those entities to TWE. In addition, with regard to Rainbow, AT&T committed to take all necessary steps, pursuant to the Commission's rules, to ensure that the two members it appoints to the Cablevision Board of Directors are properly recused from any involvement in the management or operation of Rainbow.[23] If these safeguards are adopted, they would allay all possible concerns about the merger's potential impact on the video programming marketplace and would clearly justify a finding that AT&T's post-merger interest in TWE is insulated.[24]

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[23] *See Ex Parte* at 22-23.

[24] CU *et al.* claim that AT&T's ability to be an insulated limited partner in TWE is precluded by the fact that AT&T: (1) has failed to present the limited partnership (footnote continued ...)

3. U S West's Suggestion That The Cap Cities/ABC Analysis Precludes AT&T From Achieving Insulated Status In TWE Is Without Merit.

U S West suggests that AT&T's interest in TWE is governed by the Commission's finding in the *Broadcast Attribution Order* that Cap Cities/ABC's sale of programming to a limited partnership prevented Cap Cities/ABC from maintaining insulated status in the partnership.[25] This analysis is incorrect. The programmer at issue in the Cap Cities situation was *wholly owned and completely controlled* by the parent broadcast network. By contrast, the sale of programming to TWE by Liberty, Rainbow, the video programming providers in which MediaOne holds an interest, and Viewer's Choice does not involve AT&T *itself*, particularly when, as shown above, all of AT&T's interests in these programming services are so attenuated.[26]

(...footnote continued)

agreement between MediaOne and TWE to the Commission; and (2) has failed to provide a certification that the limited partnership agreement explicitly sets forth 7 specific criteria of insulation. CU *et al.* at 7; *see also* U S West at 4. CU *et al.* is wrong on both counts. The relevant limited partnership agreement has been twice filed under a protective order with the Commission. *See* Letter from Michael G. Jones, Willkie Farr & Gallagher, to Ms. Magalie Salas, FCC, filed in CS Docket No. 99-251 (September 3, 1999); Letter from Michael G. Jones, Willkie Farr & Gallagher, to Ms. Magalie Salas, FCC, filed in CS Docket No. 99-251 (September 13, 1999). It is available to all parties agreeing to be bound by the Commission's confidentiality requirements. Moreover, while explicit recitation of the 7 insulation criteria within a limited partnership agreement will generally be *sufficient* to establish insulation, it is not a *necessary condition* as a limited partner can demonstrate insulation when the attribution criteria are not specifically delineated in the limited partnership agreement. *See Sacramento RSA Limited Partnership*, 9 FCC Rcd. 3182, at n.18 (1994).

[25] *See* U S West at 7.

[26] U S West is clearly wrong in suggesting that Liberty is the equivalent of the wholly owned and controlled subsidiary at issue in the Cap Cities situation. U S West at (footnote continued ...)

Moreover, under the new equity-debt ("ED") rule, a limited partner's insulated status is only disturbed where *both*: 1) the limited partner holds greater than 33 percent of the total assets of the limited partner; *and* 2) the limited partner is a "major program supplier" to the partnership, *i.e.*, it supplies over 15 percent of the total weekly programming to the limited partnership.[27] The Commission adopted this rule in the same Order in which the Cap Cities paragraph appears. Thus, the Commission cannot read the Cap Cities paragraph to mean that *any* limited partnership interest combined with *any* sale of programming destroys a limited partner's insulation. To do so would render the ED rule meaningless.

The fact that the Commission did not adopt the major program supplier prong of the ED rule in the context of the cable horizontal ownership limit[28] does not eliminate the relevancy of the ED rule for purposes of analyzing whether AT&T's interest in TWE is insulated. First, the decision to exclude the major program supplier prong in the cable horizontal context is arbitrary and capricious. The Commission attempts to justify the decision on the basis that cable operators and broadcasters have different market

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(...footnote continued)

7. As fully explained by AT&T, Liberty is operationally distinct from AT&T, and AT&T has no control over Liberty.

[27] *See* 47 C.F.R. § 73.3555 Note (2)(j) (making clear that the ED rule trumps the insulated limited partnership exception *only* if both the 33 percent and major programmer supplier prongs are met). *See also Broadcast Attribution Order* at ¶ 37 ("[In applying the ED rule,] [w]e will also include equity held by insulated limited partners in limited partnerships.").

[28] *See Cable Attribution Order*, at ¶ 90.

structures.[29] However, that conclusion is squarely at odds with the Commission's conclusion earlier in the same order that the market structures of cable and broadcasters are sufficiently similar to justify application of the same basic attribution rules in both contexts.[30] Further, the Commission applied the ED rule -- with the major program supplier prong -- to various other cable rules, so a distinction between cable and broadcast market structures clearly will not withstand analysis.[31] Finally, the Commission cannot distinguish the cable horizontal rule on the basis that it raises *national* cable issues, as opposed to *local* broadcast issues, since the major program supplier component *does* apply to the broadcast *national* limit.

Second, the decision to eliminate the major program supplier prong for the cable horizontal rules is irrelevant for purposes of analyzing whether AT&T's interest in TWE is insulated. The Commission's decision not to apply the major program supplier prong in the cable horizontal context had nothing to do with the issue of under what circumstances a limited partner could retain insulated status. Rather, as noted, it had to do with the wholly unrelated issue of the Commission's perceived difference between cable and broadcast market structures. Thus, the Commission made no assessment that insulated limited partners in the cable context should be subject to *stricter* rules than on the

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[29] *Id.*

[30] *Id.* at ¶ 33-35.

[31] *See Cable Attribution Order*, at ¶ 91 (applying the same ED rule discussed above, including the major program supplier prong, to 47 C.F.R. §§ 76.501(d) (cable/SMATV cross-ownership), 76.505 (cable-telco buy-out prohibitions), and 76.905(b)(2) (effective competition)). *See also* 47 C.F.R. § 76.501 Note 2(i)(1).

broadcast side. To the contrary, the Commission's intent in the cable attribution order was, in fact, to *broaden* the insulated limited partnership insulation exception in order to facilitate the significant consumer benefits that will flow from greater local telephony and broadband competition.[32]

Thus, the Commission cannot escape its finding that a limited partner's insulation is disturbed only where the limited partner is a greater than 33 percent interest holder, as well as a significant program supplier. Because AT&T's post-merger interest in TWE will be well below 33 percent, the fact that entities in which AT&T has an interest sell programming to TWE cannot destroy AT&T's insulation in TWE.

At the very least, the Commission must inform its analysis of AT&T's insulated status in TWE based on its recognition -- in both the cable and broadcast contexts -- that without *both* a greater than 33 percent interest and the significant supply of programming to a limited partnership, a limited partner does not lose its insulation.

On the other hand, if the Commission takes the view that the major program supplier component of the broadcast ED rule does not apply to its analysis here, it is hard to see how the Commission could then reasonably find that its Cap Cities' statement -- adopted in the same *Broadcast Attribution Order* -- *does* apply to this analysis. It would be arbitrary and capricious for the Commission to apply its rules in such a piecemeal and inconsistent fashion.

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[32] *See Cable Attribution Order*, at ¶ 63.

4. AT&T's *Purchase* of Programming *From* TWE Does Not Disturb AT&T's Insulated Status In TWE.

CU *et al.*'s argument that AT&T's *purchase* of video programming *from* TWE precludes a finding that AT&T is an insulated limited partner is baseless. The Commission rejected this argument 14 years ago when it adopted the insulation criteria for limited partners. There, the Commission explained that a limited partner could be a customer of the limited partnership without disturbing the limited partner's insulation.[33] As such, AT&T's purchase of HBO, Cinemax, and other programming from TWE for delivery over AT&T's cable systems is completely irrelevant to the question of AT&T's status as an insulated limited partner in TWE.

C. The Significant And Substantial Public Interest Benefits Of The Proposed Merger Strongly Support The Conclusion That AT&T's Interest In TWE Will Be Insulated.

AT&T wishes to emphasize again that the ability to retain MediaOne's interest in TWE is critical to the proposed merger and to AT&T's ability to achieve the broad, rapid deployment of competitive telephony and broadband services. Any mechanical application of the attribution rule which attributes the TWE cable subscribers to AT&T, without regard to the totality of the circumstances surrounding AT&T's relationship with TWE, threatens the merger and the vast competitive benefits it promises for consumers.[34]

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33 *See In the Matter of Corporate Ownership Reporting and Disclosure by Broadcast Licensees,* Mem. Opin. & Order, 58 R.R. 2d. 604, at n. 72 (1985).

34 AT&T stresses that it should be treated as an insulated limited partner in TWE *even putting aside the extraordinary public interest benefits that the merger will produce,* because, as noted, the nature of AT&T's post-merger interest in TWE *alone* -- and certainly when combined with the additional safeguards proposed by AT&T --

(footnote continued ...)

CU *et al.*, U S West, and SBC nonetheless assert that the Commission cannot take the benefits of the merger into account in analyzing whether AT&T's post-merger interest in TWE will be insulated.[35] This position is without merit. First, the Commission clearly has the authority to consider whether application of one of its rules will frustrate other important public policy goals. Indeed, given the importance which Congress has attached to local telephone competition, the Commission has an *obligation* to consider how the strict application of its attribution rules will impact the benefits of the merger. Second, given the Commission's recently adopted cable horizontal ownership rules,[36] the ability of AT&T to maintain insulated status for the TWE cable systems is inextricably linked with the ultimate outcome of the Commission's public interest review of the merger. Third, it makes no sense that the Commission cannot consider the benefits of the merger in the very proceeding established to review the merger. In fact, during the proceedings on the cable attribution rules and the horizontal ownership rules, the Cable Services Bureau took the position that it was inappropriate to consider the benefits of the merger because the

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(...footnote continued)

demonstrate that AT&T will not be materially involved in the video programming related activities of TWE.

[35] *See* CU *et al* at 27-29; U S West at 11-12; SBC at 5-8.

[36] Even though the rules are stayed, the Commission continues to demonstrate its interest in how the merger will comport with the rules. *See* Letter from To-Quyen Truong, Associate Chief, Cable Services Bureau, to Joan Marsh, Director, Federal Government Affairs, AT&T Corp. (Oct. 26, 1999).

proceedings were of "general applicability."[37] Rather, the Bureau said that the benefits of the merger would be considered in the merger proceeding.[38] In light of this fact, it is clearly inappropriate for CU *et al.*, U S West, and SBC to once again urge the Commission to ignore the benefits of the merger.[39]

The substantial and uncontested benefits of the merger strongly support the conclusion that the Commission should avoid a mechanical application of the attribution rules that would threaten the merger. AT&T has entered into the record in this

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[37] This fact alone undermines the position of CU *et al.*, U S West, *and* SBC that the Commission *already* may have taken the benefits of the merger into account in amending the attribution rules. While the Commission took into account the general possibility that the old attribution rules could prohibit combinations that would facilitate the provision of telephony by cable operators, it did *not* take into account the specific benefits of this proposed merger.

[38] *See also* statements of Deborah Lathen, Chief, Cable Service Bureau, and To-Quyen Truong, Associate Chief, Cable Services Bureau, at Press Conference following October 8, 1999 Open Meeting, *supra*, note 10.

[39] CU *et al.* also claim that AT&T cannot be an insulated limited partner based on a statement submitted to the Commission by AT&T stressing that the AT&T/MediaOne merger will "'strengthen [the] outlook for telephony JVs [joint ventures] with other MSOs.'" CU *et al.* at 5; *see also* U S West at 5. However, a telephony joint venture between AT&T and TWE would not be inconsistent with AT&T's ability to remain an insulated limited partner in TWE. The very reason the Commission narrowed the insulated limited partnership rule from "media-related activities" to "video programming-related activities" was to allow an insulated limited partner to be involved in the telephony and Internet activities (but not the video programming activities) of the partnership, without disturbing the partner's insulated status. *Cable Attribution Order*, at ¶ 63.

proceeding very specific analyses describing both the *qualitative* and *quantitative* nature of these benefits, including the following:[40]

- ***Increased Local Competition with ILECs.*** By combining their complementary assets,[41] AT&T and MediaOne will greatly increase competition to the local telephone monopolies. This will produce immediate benefits in the form of lower prices, better quality, and increased innovation in the provision of local telephone services.[42] The merger will enable AT&T and MediaOne to achieve *faster* and *deeper* telephony penetration in each market, thereby providing the only prospect of a real, near-term competitive threat to incumbent local telephone providers. AT&T's brand name is particularly important in this regard. MediaOne's reputation has undoubtedly improved as it has pursued its laudable telephony deployment campaign, but the enormous advantage enjoyed by the incumbent LECs over *all* cable companies is both stark and undeniable. MediaOne's own surveys produced separately, under the protective order, confirm this reality. AT&T's telephony brand and reputation will allow the combined entity to challenge the incumbent LECs' bottleneck monopolies in ways and on a scale that a stand-alone cable company simply could not hope to replicate.

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[40] *See Public Interest Statement* at 20-32; *Reply* at 5-26; *Ex Parte* letter from Stephen C. Garavito, General Attorney, AT&T, to Ms. To-Quyen-Truong, November 24, 1999, at 6-13 ("*Interrogatory Letter*").

[41] The complementary assets that will permit successful competitive entry include: (1) MediaOne's existing cable network to millions of households, most of which has already been upgraded to provide high-speed two way service; (2) MediaOne's technical expertise in deploying circuit-switched local telephony services over cable; (3) AT&T's brand name, reputation, and experience as a reliable provider of two way communications services; (4) AT&T's experience and resources in marketing and customer care; (5) AT&T's experience in obtaining interconnection and other agreements with ILECs; and (6) AT&T's head start in developing IP telephony. Each of these complementary assets is explained in detail in the *Interrogatory Letter*, at 6-10.

[42] The merger also promises longer term (and equally important) benefits because it will create competitive market constraints on the ability of these same incumbent monopolists to leverage their existing monopolies into the provision of other services.

- ***Quantifiable Consumer Benefits From Increased Competition.*** AT&T recently submitted an economic analysis prepared by Professors R. Glenn Hubbard and William H. Lehr of Columbia University that quantifies the estimated benefits that consumers are likely to obtain as a result of the merger of AT&T and MediaOne.[43] Drs. Hubbard and Lehr conclude that "*a conservative estimate of the potential savings for consumers from the increased competition exceeds $600 million per year, or $3.7 billion in net present value.*"[44]

- ***Increased Scale, Scope, And Clustering Efficiencies Which Will Accelerate The Availability Of Competitive Telephony And Other Broadband Services For Millions Of Consumers.*** The merger also will allow the combined entity to achieve substantial economies of scale, scope and clustering. Economies of scale will result from the expanded footprint and subscriber base of AT&T's post-merger cable network. Economies of scope will result from offering telephone, data, and broadband services over MediaOne's cable platform at increased penetration levels. And economies of clustering will result from the ability to use common assets or activities to service adjacent or neighboring territories.[45] Although forward-looking estimates of merger economies are necessarily imprecise, the transaction price paid by AT&T reflects its judgment that the

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43 *See* Declaration of R. Glenn Hubbard and William H. Lehr on Behalf of AT&T Communications, filed in CS Docket No. 99-251 on December 8, 1999.

44 *Id.* at ¶ 20 (emphasis added). While these potential savings for consumers are enormous in and of themselves, Drs. Hubbard and Lehr stressed the highly conservative nature of this estimate because: (1) it is limited to only switched lines in those states currently served by MediaOne, even though "the aggregate number of local access lines that are likely to benefit from substantial price reductions following AT&T's entry are likely to exceed the total number of lines in the eight states where MediaOne operates; (2) they have not assumed that the merger will immediately make local access markets competitive, or that the ILECs' profits will be eliminated overnight; (3) they ignore the substantial economies of scale, scope, and clustering that other witnesses for AT&T and MediaOne have shown will also result from the merger; and (4) their estimate is limited to *direct price savings* enjoyed by existing local telephone service consumers, even though the *indirect and non-price benefits* "may very well be more significant over the long run than the direct benefits of the ILECs' competitive price reductions." *Id.* at ¶ 24.

45 Each of these three types of efficiencies is explained in detail in the *Interrogatory Letter*, at 10-11.

> economies are likely to be large. Analyses by MediaOne, AT&T, and investment bankers support this conclusion.[46]

Not only are these benefits real and substantial, there are no alternative means likely to achieve them. As AT&T and MediaOne have previously demonstrated, the incumbent LEC monopolies have been enormously resistant to competitive entry. The limited effectiveness since the 1996 Act of entry through the purchase of unbundled network elements or the resale of wholesale services demonstrates that broad-scale facilities-based entry is the only plausible way to inject effective competition into local exchange markets for the foreseeable future. Large-scale facilities-based entry is unlikely to occur through the solo efforts of MediaOne or other cable companies: the modest success of even well-managed providers of cable service in penetrating local telephone markets confirms that cable companies lack the brand reputation needed to gain market share rapidly among consumers. For reasons previously explained by AT&T and

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[46] In the third quarter of 1998, MediaOne staff prepared an analysis of the potential economies available from a doubling of MediaOne's size in terms of homes passed (without any increase in penetration ratios). MediaOne estimated cash flow increases of 9-17 percent and earnings increases (before taxes, depreciation, and amortization) of 12-24 percent (with the variations turning on assumptions regarding the impacts of the size increase on clustering potential). These increases reflected projected cost savings per subscriber in the range of 5 to 15 percent for a number of expense categories, including corporate overhead, regional overhead, network operations, programming, marketing and sales expense, and capital expenditures. AT&T has estimated that MediaOne's cable telephony revenues post-merger would be $1.3 billion higher in 2004 with the merger than without it, and that MediaOne's telephony penetration of homes marketed in 2004 would be 30 percent with AT&T versus 16 percent without AT&T. AT&T further estimated annual synergies from the merger, excluding those due to revenue enhancements, of $175-200 million per year. Goldman Sachs estimated synergy improvements in 2002 of $1.574 billion in annual revenues and over $500 million

(footnote continued ...)

MediaOne, joint ventures and other contractual arrangements to provide local telephone services are difficult to negotiate and structure.[47]

Neither the existence nor the great magnitude of the benefits that the merger will produce can seriously be questioned. Indeed, no commenters even attempted to dispute that the merger would produce tremendous public benefits. Commenters' assertions that the Commission should ignore these benefits as it considers the merger, and instead focus on a narrow, technical reading of the attribution rules, are without merit. To the contrary, the very reason the Commission adopted the new cable attribution rule was a concern that the old rule would "prevent investments between companies whose combination may bring benefits to the public, such as cable broadband and telephony services and competition to the incumbent local exchange carriers on the Internet."[48]

IV. ALTERNATIVELY, AT&T REQUESTS THAT THE COMMISSION GRANT A LIMITED, 18-MONTH WAIVER OF THE PROGRAMMING SALE PRONG OF THE INSULATION CRITERIA.

The foregoing discussion demonstrates that AT&T's limited partnership interest in TWE will be insulated under the Commission's rules because AT&T will not be "materially involved in the video-programming activities" of TWE.[49] If, however, the Commission

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in annual EBITDA. These synergies are *in addition to* already planned cost reductions of $2 billion in annual sales, general, and administrative expenses.

47 *See Reply* at 18-23.

48 *See Cable Attribution Order* at ¶ 63.

49 *See id.*

believes that a technical triggering of the attribution rules occurs by virtue of the sale of certain programming in which AT&T has an interest to TWE, AT&T hereby requests that the Commission grant it a limited, 18-month waiver of the program sale prong (criterion #6) of the limited partner insulation criteria set out in the *Cable Attribution Order* at ¶ 64.

Such a waiver clearly is within the Commission's discretion. The Commission may grant a waiver of any of its rules "for good cause shown."[50] Good cause exists where: (i) special circumstances warrant deviation from the general rule, and (ii) such deviation would better serve the public interest than strict adherence to the rule.[51] AT&T's request for a limited waiver satisfies both elements of this standard.

A. Special Circumstances Warrant Deviation From The General Rule.

First, at the time the proposed merger was announced, neither the revised cable horizontal or attribution rules nor any Commission interpretation of the program sale prong of the limited partnership insulation criteria had been adopted. Indeed, AT&T believed in good faith that its post-merger limited partnership interest in TWE would qualify for insulation under the principles of the previously adopted (but suspended)

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50 47 C.F.R. § 1.3; *see Affinity Corp. et al.*, CC Docket No. 96-45, FCC 99-280 (1999) (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) ("*WAIT Radio*")); *Keller Communications, Inc. v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997) (generally citing *WAIT Radio* and *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) ("*Northeast Cellular*")). *WAIT Radio* and *Northeast Cellular* are the two primary court decisions upon which the Commission relies when determining whether or not to grant a waiver.

51 *See, e.g.*, *Affinity Corp. et al.*, at ¶ 28; *Startec*, 14 FCC Rcd. 8030, at ¶ 6 (1999); *Northeast Cellular*, 897 F.2d at 1166.

ownership and attribution rules. AT&T still believes that its post-merger interest satisfies the criteria for insulation, and it cannot be disputed that the only basis for a contrary claim -- the program sale interpretation of the attribution rules -- came to light only after the merger was announced. In these circumstances, there is a strong equitable basis for grant of the requested waiver,[52] which will, at a minimum, prevent the unfairness of imposing newly-adopted rules on a *post hoc* basis, and allow AT&T the time needed to take the new rules fully into account.

These principles are even more compelling here because the horizontal ownership statute is subject to a pending constitutional challenge, and constitutional and other court challenges to the Commission's revised horizontal and attribution rules are also pending. Until these challenges are resolved, the Commission has stayed its new ownership rules. Good cause for a limited waiver thus also exists because it will permit the exact scope, status, and enforceability of the new rules to be clarified. It will also prevent the anomalous and arbitrary "enforcement" against a single party of rules the Commission has, quite appropriately, represented it would not enforce.

Second, as demonstrated above and in the *Ex Parte*, good cause exists for granting this limited waiver because of the highly unusual nature of AT&T's potentially-attributable

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[52] The Commission has previously decided not to enforce ownership limits when a licensee has based its corporate structure on a good faith understanding of the then-existing ownership rules. *See Fox Television Stations, Inc. (WNYW)*, at ¶ 22 (noting that Fox "relied to a considerable degree on its good faith understanding of [the alien ownership rules] in creating its corporate structure" and that Fox's "reasonable and extensive reliance presents an equitable reason to allow [Fox] to retain its present ownership.").

interests in TWE and in entities that provide programming to TWE. At least for the limited duration of the waiver, the Commission could be quite confident that the post-merger structure of AT&T cannot implicate any of the concerns that underlie the ownership rules. Specifically, AT&T's interests in programmers that sell programming to TWE are so highly attenuated that they do not, as a realistic matter, materially involve AT&T in the video programming activities of TWE and cannot reasonably be said to implicate the underlying purposes of the cable horizontal limit. This conclusion is especially true in light of AT&T's demonstration (which was not challenged by commenters) that MediaOne's rights to participate in the management and operation of TWE's video programming businesses *already* have been terminated, and as a result, AT&T will have no role in the day-to-day management or operation of TWE generally, let alone in the video programming area. Rather, Time Warner will have both *de jure* and *de facto* day-to-day control over TWE and TWE's video programming activities.

Third, in the *Ex Parte*, AT&T proposed further safeguards that make even clearer that AT&T will have no involvement in the video programming activities of TWE. Specifically, AT&T committed: 1) to a prohibition on communications, participation, or involvement with the programmers in which AT&T will have an attributable interest regarding the sale of programming to TWE; and 2) that it would take all necessary steps, pursuant to the Commission's rules, to ensure that the two members it appoints to the Cablevision Board of Directors are properly recused from any involvement in the video programming activities of Rainbow.

Fourth, in further response to commenters' concerns, and in the interest of expediting the Commission's review of the merger, AT&T proposes the following

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additional safeguards which AT&T would implement as conditions of granting the limited waiver, and which further underscore that good cause exists for the waiver sought:

- AT&T would certify to the Commission every six months, on the basis of an independent audit, that no AT&T employee or agent has been involved in, or otherwise attempted to influence or play any role in, the video programming activities of TWE, including the purchase, pricing, or marketing of video programming;

- AT&T would certify to the Commission every six months, on the basis of an independent audit, that no AT&T employee or agent has been involved in, or otherwise attempted to influence or play any role in, the provision of video programming to TWE by Liberty, Viewer's Choice, Rainbow, and the MediaOne programming entities; and

- With respect to Liberty, AT&T will: (1) replace the three Class A directors it has appointed to the Liberty Board of Directors with three independent persons that are neither directors, officers, or employees of AT&T; (2) submit the names of the proposed independent directors to the Commission prior to appointing them to the Liberty Board; and (3) structure the AT&T Board agendas and reports in a manner that excludes Dr. John Malone from participating in any matters involving the video programming activities of AT&T's cable systems.

Given the uncertain status of the rules, the facts surrounding AT&T's relationship with TWE, and the further safeguards AT&T has proposed, the Commission should have no cause for concern that during the waiver period AT&T will be materially involved in the video programming activities of TWE. Moreover, to the extent that the horizontal statute is found constitutional and the stay of the Commission's rule is lifted, the limited waiver would permit AT&T a reasonable amount of time to take such steps as are necessary to resolve any outstanding issues related to its compliance with the rules.[53]

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[53] AT&T's proposed 18-month waiver period is consistent with well-established Commission precedent allowing parties 18 months to divest cable-related

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AT&T has always said that it will comply with whatever horizontal rules the Commission ultimately imposes. The waiver will give it an opportunity to do so in an orderly and rational fashion, after the rules are finally set in an enforceable manner. In that regard, there are numerous possible ways in which AT&T could effect compliance. For example, AT&T could consider divesting or restructuring its interests in entities that sell programming to TWE, to preserve the insulation of AT&T's interest in TWE. Alternatively, AT&T could consider reducing the total number of its cable subscribers so that there is no attribution issue relevant to AT&T's overall ownership level. Until the ultimate scope of the rules can be determined, however, it is unnecessary and impractical for AT&T to be required to select precisely which way or ways it will choose to ensure compliance with those future rules.

B. Deviation From The Rule Would Better Serve The Public Interest Than Strict Adherence To The Rule.

Grant of AT&T's requested waiver (assuming such a waiver is even necessary) would also meet the second prong of the good cause standard because such a limited

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properties that were the subject of an ownership restriction. *See, e.g.*, *US West*, 11 FCC Rcd. 13260 (1996) (20+ month divestiture period to comply with the cable-telco cross-ownership rule); *NEPSK*, 11 FCC Rcd. 4269 (1996) (18 month divestiture period to comply with broadcast-cable television cross-ownership rule); *Cox Cable*, 10 FCC Rcd. 1559 (1994) (18 month divestiture period to comply broadcast-cable television cross-ownership rule); *Time Warner*, 8 FCC Rcd. 7106 (1993) (18 month divestiture period to comply with the cable-telco cross-ownership rule); *Golden West Associates*, 59 RR.2d 125 (1985) (18 month divestiture period to comply with broadcast-cable television and broadcast-newspaper cross-ownership rules). Moreover, where the initial period authorized is not sufficient, the Commission has allowed extensions. *See, e.g.*, *Insight Communications*, 12 FCC Rcd. 19623 (1997).

waiver would "better serve the public interest than strict adherence to the general rule."[54] As AT&T has demonstrated, the combination of AT&T and MediaOne will produce profound public interest benefits by allowing the more rapid and effective development of a facilities-based alternative to the ILECs for millions of the nation's homes and businesses, thereby promoting competition in not just traditional exchange and exchange access services, but also in actual and emerging complementary services. A Commission determination that TWE is attributed to AT&T and a denial of AT&T's limited waiver request could imperil the AT&T/MediaOne merger and thereby potentially deprive millions of American consumers of these significant benefits.

Not only is AT&T's limited waiver request fully justified based on the foregoing factors, it is also entirely consistent with Commission precedent. The Commission has granted numerous waivers under this "good cause" standard, including waivers to various ownership rules targeted at the very same policy goals of enhancing video program competition and diversity as the cable horizontal ownership rule. For example, in order to effectuate its merger with CBS, Westinghouse sought eighteen separate waivers (four of which were permanent waivers, 14 temporary) of various local and national ownership rules. Among others, Westinghouse sought a waiver of the television duopoly rule to permit common ownership of New York and Philadelphia television stations (which were in DMAs that overlapped) and three waivers of the "One-to-a-Market" rule for radio

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[54] *Startec,* at ¶ 6.

stations in Boston, Minneapolis, and Washington, D.C.[55] The Commission, after "balanc[ing] competing public interest concerns,"[56] granted all of Westinghouse's requested waivers and approved the merger.[57]

In short, although AT&T believes that the merger is fully consistent with the stayed horizontal rules as it is, if there is any concern or doubt about that conclusion, this is a perfect case for grant of a limited waiver. On the one hand, the extraordinarily attenuated nature of AT&T's post-merger interests in TWE and Liberty *alone* -- and certainly when combined with the additional safeguards proposed by AT&T -- will amply protect the underlying policy goals of the cable horizontal rule; on the other hand, the

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[55] *In re Applications of Stockholders of CBS Inc. (Transferor) and Westinghouse Electric Company (Transferee)*, 11 FCC Rcd. 3733, at ¶¶ 53, 68 (1995).

[56] *Id.* at ¶ 43.

[57] *See also Fox Television Stations, Inc. (WNYW)*, 8 FCC Rcd. 5341 (1993), *aff'd sub nom., Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995) (granting Fox a waiver of the daily newspaper cross-ownership rule so that it could continue to hold the license to WNYW following acquisition of the New York Post); *ACT III Broadcasting of Buffalo, Inc.*, 8 FCC Rcd. 855 (1993) (granting ACT III a waiver of the television duopoly rule and noting that while there might be a "negligible diminution of diversity and competition," such detriment was outweighed by the substantial public interest benefits to be achieved by Act III's proposal, which included substantial investment to create local news and other programming); *NEPSK*, 14 FCC Rcd. 6685 (1999) (waiving broadcast/cable cross-ownership rules due to the small number of subscribers and the presence of no other commercial television station in the relevant TV markets); *Community Communications, Inc.*, 13 FCC Rcd. 13007 (1998) (waiving daily newspaper cross-ownership rule where unique circumstances existed and where twin purposes of the rule -- promoting media diversity and competition -- would be disserved by denial of request); *Field Communications Corp.*, 65 FCC 2d. 959 (1977) (waiving newspaper-broadcast provision of the Commission's multiple ownership rules where "special circumstances" justified a waiver).

substantial public interest benefits that will be produced by allowing the merger to proceed now clearly outweigh any conceivable cost of granting the limited and temporary waiver requested here.

V. ADDITIONAL RESPONSES TO COMMENTERS

A. Response To SBC and U S West

SBC and U S West attempt to portray themselves as defenders of the video programming market.[58] However, the fact that SBC recently announced that it was halting cable franchising efforts at its Ameritech New Media subsidiary,[59] and that U S West never has made a serious effort to invest in video programming distribution,[60] suggest that their real interest is in blocking a merger that presents the *only* real competitive alternative to their local telephone monopolies.

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[58] SBC at 2; U S West at 8-11.

[59] *See* Joe Estrella, *Ameritech Cable Slows Down*, Multichannel News, Nov. 22, 1999, at 6; *SBC Halts Ameritech Cable Deployment, Subject To Review*, Communications Daily, Nov. 19, 1999. SBC has a well-documented aversion to providing video services to its customers. As the FCC noted in the SBC-Ameritech Order, "SBC sold PacTel's competitive video distribution service after the SBC/PacTel merger despite pre-merger assurances that it would not do so." *See In Re Application of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act*, CC Docket No. 98-141, FCC 99-279, at n. 1071 (1999).

[60] *See Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24284, at ¶ 114 and n. 515 (1998) ("*Fifth Annual Video Competition Report*").

Indeed, as AT&T/MediaOne have previously pointed out, every day brings new evidence that AT&T's enormous cable investment and its commitment to deliver competitive telephony is triggering competitive responses by the dominant local telephone providers. For example, soon after AT&T announced its merger with MediaOne, SBC announced that it was launching new discounted packages of telecommunications and entertainment services in Dallas, Texas and Fremont, California, the same two local markets initially selected by AT&T for offering packages of telephone services over cable.[61] These SBC service packages are offered at prices 6 to 35 percent lower than SBC's retail rates. These offerings are "a direct swipe at AT&T," which "all but screams that AT&T Corp.'s cable strategy for entering the local telephony market is forcing regional and Bell operating companies to seriously compete for their customers."[62] U S West has launched similar initiatives. For example, to attract more high-speed

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[61] *See* Jessica Hall, *SBC Launches Service Packages to Battle AT&T*, Reuters, Aug. 24, 1999; *SBC Launches Telecom/Entertainment Offerings*, SBC Press Release (Aug. 24, 1999) <<http://www.sbc.com/News_Center>>.

[62] *See* Deborah Solomon, *Pac Bell to Offer Discounted 'Bundle' Deals: Plan for Service Packages Called Direct Shot at AT&T*, San Francisco Chronicle, Aug. 25, 1999, at D1; *SBC Plans Bundles to Go Head-to-Head with AT&T Cable*, Network Briefing, Aug. 25, 1999 (1999 WL 17640065); *SBC's One-Stop Package Includes Entertainment Services*, RCR Radio Communications Report, Aug. 30, 1999 (1999 WL 7792155). Moreover, spurred by the threat of competition from AT&T, SBC announced this October that it will be spending $6 billion over the next three years to deliver DSL services, including broadband voice and data, to more than 77 million people throughout its service area. *SBC Launches $6 Billion Broadband Initiative*, SBC Press Release (Oct. 18, 1999) <<http://www.sbc.com/News_Center>>.

Internet customers "and become even more competitive with AT&T/TCI's cable modem, U S West is rolling out a lower-cost, 'part-time'" DSL service.[63]

B. Response To CU *Et Al.*

CU *et al*. suggest that the Commission's approval of the merger should turn on a "cold-blooded" assessment of the video programming marketplace.[64] It is unclear why CU *et al*. would have the Commission focus solely on the video programming aspects of this merger given the tremendous promise the merger also presents in terms of affording competitive *non-video* alternatives to millions of American consumers.

In any event, AT&T/MediaOne have already demonstrated in prior filings that the merger will have no material impact on the video programming marketplace. First, AT&T/MediaOne showed that the merger will not materially impact video programming concentration.[65] Competition in the video marketplace is in fact exploding. There are currently over 245 national satellite-delivered video services, up from 172 in 1997.[66]

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63 *See* Peter Lewis, *U S West Unveils Inexpensive Service to Lure Internet Customers,* Seattle Times, July 9, 1999 (1999 WL 17356061). *See also U S West Catapults High-Speed Internet Access to Mass Market With Nation's First '"DSL-on-Demand" at $19.95/Mo. for Casual Internet Users* (Sept. 15, 1999) <<http://biz.yahoo.com/prnews>>. As FCC Chairman Kennard noted in a recent speech, "[W]here cable modem service has been introduced, DSL has followed." *See* Remarks of FCC Chairman William E. Kennard Before the Federal Communications Bar Association's Northern California Chapter, San Francisco, CA (July 20, 1999).

64 CU *et al.* at 4.

65 *See Reply* at 27-39.

66 *Fifth Annual Video Competition Report at* ¶ 159.

Many of these are owned by large, well-funded and experienced media companies. And of the 245 national services, 61 percent are not owned by *any* MSO.[67] Furthermore, the Commission has identified 65 planned national programming services that are expected to launch in the near future.[68] The proposed merger will have no anticompetitive effects in this highly dynamic market. Recognizing this, CU *et al.* concoct an entirely different (and imaginary) merger to challenge. As it has previously, CU *et al.* erroneously contend that this merger will somehow combine all the programming interests held by AT&T, MediaOne, Liberty, TWE, and Cablevision.[69] But, as AT&T/MediaOne previously demonstrated, that claim is indefensible.[70]

Furthermore, there is no basis in economics, antitrust law, or marketplace experience to support claims that this merger will give AT&T monopsony or vertical foreclosure power over unaffiliated video programmers.[71] There can be no credible claim that AT&T will have power over price or significantly raise rival programmers' costs when these programmers can reach *three fourths* of their potential U.S. customers through *other* MVPDs, whose programming decisions will be uncontrolled and uninfluenced by AT&T.

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67 *Id.*

68 *Id.*

69 CU *et al.* at 15-22.

70 As AT&T noted in its *Reply*, the proposed merger poses no threat of undue concentration in the video programming marketplace based on its modified Herfindahl-Hirschman Index analysis. *See Reply* at 38 and App. A.

71 *See id. at 39-47.*

Moreover, the presence and success of DBS providers -- with their 10.6 million (and rapidly growing) subscriber base -- removes any doubt that AT&T could mistreat programmers.[72] Any cable company foolish enough to attempt that would succeed only in driving its intended "victims" into the arms of its DBS competitors.

CU *et al.'s* claim that AT&T's *Ex Parte* was late-filed is similarly groundless. As the docketed correspondence between AT&T and the Cable Services Bureau on this matter makes clear, the Bureau had proposed to meet with AT&T the week of November 1, 1999, to be followed by a written submission from AT&T the following week.[73] As AT&T noted in its follow-up letter to the Cable Services Bureau, AT&T and Bureau staff were unable to meet until mid-November due to scheduling conflicts.[74] Consequently, AT&T requested in writing that it be permitted to file its *Ex Parte* submission on November 24, 1999.[75] The Bureau granted the extension of time.[76] Contrary to CU *et*

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[72] *See US DTH Subscribers: October 1998-October 1999*, SkyReport.com, <<www.skyreport.com/skyreport/dth_us.htm>>.

[73] *See* Letter from To-Quyen Truong, Associate Chief, Cable Services Bureau, to Joan Marsh, Director, Government Affairs, AT&T Corp., filed in CS Docket No. 99-251 (Oct. 26, 1999).

[74] *See* Letter from Joan Marsh, AT&T, to To-Quyen Truong, Cable Services Bureau, filed in CS Docket No. 99-251 (Nov. 18, 1999). *See also* AT&T Notice of Oral *Ex Parte*, filed in CS Docket No. 99-251 (Nov. 16, 1999).

[75] *See* Letter from Joan Marsh, AT&T, to To-Quyen Truong, Cable Services Bureau, filed in CS Docket No. 99-251 (Nov. 18, 1999).

[76] *See AT&T Corp. and MediaOne Group, Inc. File Submission on Compliance with New Cable Ownership Rules,* Public Notice, CS Docket No. 99-251, DA 99-2661 (Cable Services Bureau) (Nov. 30, 1999).

al.'s suggestion, there was nothing nefarious or untoward about the comment schedule relative to the *Ex Parte*.

C. Response To Global Wireless Consumers Alliance

The Commission should reject the comments of Global Wireless Consumers Alliance since they do not even address, much less refute, any of AT&T's statements or analysis in the *Ex Parte*. Rather, they focus primarily on concerns about broadband access to the Internet. AT&T has already fully answered all of these concerns in its original Reply Comments in this proceeding and will not repeat that analysis here.[77]

Even where Global Wireless touches upon the cable horizontal cap, it provides little more than conclusory assertions and unjustified demands that the Commission prevent AT&T from getting any larger.[78] Since nothing in Global Wireless's comments even questions the analysis in the *Ex Parte* that AT&T post-merger will serve fewer than 30 percent of all MVPD subscribers, no response to these comments is warranted.

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[77] *See Reply* at 68-126.

[78] AT&T notes that Global Wireless' statement that post-merger AT&T would "control close to 60 percent of all cable subscribers in the country" is patently untrue under any conceivable application of the Commission's attribution rules to AT&T's cable holdings. AT&T also notes that U S West overstates AT&T's subscribership levels, assuming *arguendo* that AT&T had an attributable interest in TWE. *See* U S West Comment at 2 and n. 2. This is because when adding the TWE subscribers, to avoid double counting, one would have to subtract the 1,424,000 subscribers in the AT&T-Time Warner joint venture systems in Kansas City and Texas which are already included in AT&T's numbers (*see Ex Parte* at Exhibit A) and are also included in the TWE numbers. *See Public Interest Statement* at n. 151 and Exhibit A.

D. Response To Greater New Haven Chamber Of Commerce

The Commission also should reject the comments of the New Haven Chamber of Commerce. Greater New Haven's only argument is that since the Commission's attribution rules are triggered by a 5 percent interest, AT&T's 25.51 percent stake in Time Warner creates an attribution. Greater New Haven fails to account for the Commission's recently revised cable attribution rules which permit non-attribution of limited partnership interests below 33 percent if properly insulated.[79] As AT&T has shown, it will be an insulated limited partner in TWE post-merger; given this insulation, Greater New Haven is incorrect in suggesting that AT&T's 25.51 percent interest in TWE triggers attribution.[80]

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79 *See Cable Attribution Order* at ¶ 82.

80 Greater New Haven is also incorrect in stating that post-merger AT&T will control 60 percent of all cable subscribers in the country. *See supra* note 78.

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VI. CONCLUSION

Based on the foregoing and the previous comments filed by AT&T/MediaOne in the above-captioned proceeding, AT&T/MediaOne respectfully urge the Commission to expeditiously grant AT&T/MediaOne's transfer of control application.

Respectfully submitted,

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December 21, 1999

CERTIFICATE OF SERVICE

I, Laura Dennis, do hereby certify that I caused one copy of the foregoing *Ex Parte Reply Comments* of AT&T Corp. and MediaOne Group, Inc. to be served by hand delivery on all parties on the attached service list, this 21st day of December 1999.

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